

Bond Case Briefs

Municipal Finance Law Since 1971

Few Clues Detected on Fate of Illinois Pension Overhaul.

CHICAGO – Legal observers aren't placing any bets on the outcome after watching the oral arguments in the Illinois Supreme Court case that will decide the fate of the state's overhaul of most of its employee pensions.

Only the three Republican justices on the seven-member court posed questions to the state's lead attorney, Solicitor General Carolyn Shapiro, and the two private attorneys representing the unions, retirees, and employees challenging the legislation.

The four Democratic justices remained silent during the nearly one-hour session Wednesday in which attorneys argued their sides in the dispute over whether the 2013 legislation that cut benefits for four of the state's five pension funds violates the state constitution.

The court is expected to rule sometime this spring.

"I think it was fully and fairly presented by both the state and plaintiffs," said municipal law and restructuring veteran James Spiotto, who is co-publisher of MuniNet Guide. "It's always very hard to judge from the questions what the result will be based on the questions because it's only guessing."

Silence among justices is also a hard read. "Sometimes, certain justices may take the lead on questioning on some issues and others allow them to do that," Spiotto said.

"I'm not a gambler so I wouldn't put a bet on it, but I think there's a chance it may go down to the lower court for an argument on the merits," said Ty Fahner, a partner at Mayer Brown and a former Illinois attorney general who heads up the Civic Committee of the Commercial Club of Chicago, which has lobbied for pension reforms.

If sent back to the lower court, "I think there's a lot of work to be done to convince the court that the state has met the standard," Fahner said.

A delay could aid the state's argument that it faces a fiscal emergency as its budgetary situation is not easing.

The Supreme Court is considering the case on an expedited basis.

It could uphold a lower court ruling from November voiding the legislative package as a violation of the state constitution's pension clause, siding with union attorneys who argue the guarantee is absolute.

Or, it could decide the protections are on par with other state contracts and subject to modification in the case of a fiscal emergency as the state argued. Under that scenario, the case would likely be sent back to the Sangamon County Circuit Court where the argument over whether the state met strict standards for altering a contract would be vetted.

The court could issue a more sweeping ruling upholding the legislation, but it was not asked by the

state to do so as there was no debate over whether conditions existed for the state to tap its police powers when the case was before the lower court.

Fahner also did not read too much into the silence of the majority of justices but said the probing questions and demeanor of Justice Robert R. Thomas are not a good sign for the state.

The state senator who sponsored the pension legislation offered a foreboding assessment after attending the arguments.

"I think the indications are that we'll be back to the negotiation table," said state Sen. Kwame Raoul, D-Chicago, adding he hoped the court's eventual ruling provides some guidance for lawmakers on what could withstand a legal challenge. "That may or may not happen, hopefully it will."

The questioning led by Thomas was primarily aimed at the state's arguments about its police powers, the centerpiece of its argument that it needs to override language in the state constitution protecting pensions.

Shapiro, the solicitor general, told the judges the plaintiffs' position that pensions can never be cut "remarkable."

"If the state's bond rating collapsed rendering borrowing prohibitively expensive, pensions would be entirely off limits regardless of the essential state services that might have to be eliminated," she said.

But Thomas pressed her on whether granting the use of police powers would give the state too much future license.

"If the court holds that the state can invoke its police powers to violate core constitutional guarantees to respond to an emergency that at least arguably the state itself created, then aren't we giving the state the power to modify its contractual obligations whenever it wants? For instance, the state could simply fail to fund the pension systems and then claim an emergency," the justice asked.

Shapiro stressed that the state constitution provides only a few exceptions for such modifications. "The lower court will conclude whether the circumstances justify the state's actions," she said.

Justice Thomas also questioned how much of the state's fiscal woes are due to the General Assembly's failure to extend the 2011 income tax hike. The higher rates partially expired and lawmakers have not acted to make up the lost revenue. Shapiro acknowledged that the state's budget situation remains unresolved.

Justice Lloyd A. Karmeier pressed Shapiro further on the role of sovereign power in the constitution.

"If sovereign power resides in the people, and the people adopt a constitution which specifically provided for a pension clause having different wording than the contract clause," does that not indicate the how the public has directed the state to act, he asked.

Shapiro answered that the state and federal constitution prohibit the state from entering into a contract that would limit its ability to act to "protect the public welfare in extreme situations."

Chief Justice Rita Garman asked union attorney Gino DiVito whether the state's police powers could ever be used to impair pensions. DiVito did not directly answer, instead saying "not under these circumstances."

Union attorney Aaron Maduff then addressed the question pointedly.

The state constitution lays out situations where the state can act and “those limitations are not in the pension clause,” Maduff said.

The Illinois constitution states that membership in any Illinois pension system “shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired.”

Shapiro argued that questions over the extent and cause of the state’s fiscal emergency and pension woes should be made at the lower court level.

Justices questioned why, if the state is mired in such a fiscal emergency, they were not asked to rule on whether the standard for invoking police powers was met, since further debate at the lower court level would simply delay a final decision.

Shapiro said the state believed there is enough time for the state to act on its budget.

The state contends its fiscal solvency is under threat and argues that position is underscored by its unfunded pension tab of \$111 billion in a system that is just 39% funded. Rising payments are crowding out funding for essential services and infrastructure, the state argues, and the state’s bond rating has been pummeled, driving up its borrowing costs. The state is saddled with a backlog of unpaid bills of at least \$5 billion and faces a \$6 billion budget deficit.

THE BOND BUYER

BY YVETTE SHIELDS

MAR 12, 2015 5:04pm ET